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622351—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 578

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LESTER FIELD, DECEASED, BARNETT HOLLANDER, TEMPORARY ADMINISTRATOR AND EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 15–19) is reported in 2 T. C. 21. The opinion of the circuit court of appeals (R. 24–26) is reported in 144 F. 2d 62.

JURISDICTION

The judgment of the circuit court of appeals was entered on August 1, 1944 (R. 27). The petition for a writ of certiorari was filed on October 10, 1944, and was granted on December 4,

1944 (R. 27). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the full value of property transferred in trust by the decedent should be included in his gross estate under Section 302 (c) of the Revenue Act of 1926, as held by the Tax Court, or whether that value should be reduced so as to include only the value of a remainder payable at all events upon the death of the survivor of two of decedent's nieces, as held by the circuit court of appeals.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT

The Tax Court found the following facts (R. 16–17):

Decedent died on November 16, 1937, at the age of 52. On June 8, 1922, he transferred to Bankers Trust Company, as trustee, certain assets valued at the date of his death at the sum of $307,452.82, which value was included by the Commissioner in decedent's estate in computing the present deficiency. (R. 16.)

Summarized, the terms of this trust are (R. 16):

A. The trust is to continue for the joint lives of two nieces and the life of the survivor of them unless terminated earlier under F, *infra*.

B. The income is to be paid to decedent for his life unless the trust terminates before his death.

C. Upon the death of decedent prior to the termination of the trust leaving issue or a widow, $150,000 is to be placed in trust for the widow and the balance, or, if he left no widow, all, is to be held in trust for his children, the issue of any deceased child to take the share of such deceased child. Separate, equal trusts are to be set up for each.

D. The aforesaid trusts are subject to decedent's right to reduce or cancel the amounts of the gifts by will or instrument in writing and the amounts by which any gifts are reduced or canceled are to be added to the gifts for the issue which are not reduced (no restoration being permitted of any gift reduced).

E. If the decedent cancels all of the gifts or reduces gifts so that there remains a balance undisposed of, then all of the balance undisposed of is to go to his brother or sister surviving or their issue.

F. During the continuance of the trusts the income is to be paid to the beneficiary named and upon the death of the beneficiary during the continuance of the trust the corpus is to be paid to the beneficiary's issue surviving, but if there be

none, to the issue of the decedent surviving; if none, then to decedent's brother or sister or their issue.

G. Upon the death of the widow, the corpus of the trust created for her benefit is to go to the issue of decedent surviving, but if none, then to the brother or sister or their issue.

H. Upon termination of the trust before the death of the decedent the corpus is to be paid over to decedent.

I. Upon termination of the trust after the death of decedent but during the existence of any trust the corpus is to be paid to the life beneficiary.

The decedent at no time had any issue. At the time of his death, decedent was survived by his two nieces whose lives were to measure the maximum life of the trust, and they were then 18 and 25 years old, respectively. He was also survived by his widow, Blanche Field, by his sister, Ruth Rosenfield Hollander, and by John R. Field and Warren R. Field, issue of a deceased brother, Hugo Rosenfield (R. 16–17).

It is conceded by the taxpayer that the value of the corpus of the trust to the extent of $150,000, directed to be set aside for the decedent's widow, was properly includible in decedent's gross estate at his death, since decedent, to the extent of that value, retained until his demise the power to change the disposition of the widow's fund in that maximum amount by reducing or canceling it in its entirety. The value of a remainder in the sum

of $157,452.82, payable at all events upon the death of the survivor of two females, aged 18 and 25 years, respectively, was, at the time of decedent's death, $24,930.76. The value at the date of decedent's death to a man aged 52 years of the right to receive a remainder in the sum of $157,452.82, payable upon the death of the survivor of two females, aged 18 and 25, respectively, contingent upon his survival of both of such females, was $891.18. (R. 17.)

The Tax Court held that the full amount of $157,452.82 was includible in the gross estate, but the court below reversed and remanded the case to the Tax Court with directions to include only $24,930.76 thereof. In so holding, the court said (R. 26):

> Accordingly we hold that the value of the transfer at decedent's death consisted of the value of the trust property minus the value of the life estates of his two nieces.

But the two nieces did not have life estates, although their lives did measure the duration of the trusts. It must be assumed, therefore, that what the court meant was that the gift of the $157,452.82 must be reduced by discounting the value of the property for the period of the life expectancy of the survivor of the two nieces. In this way, the value of interests which might conceivably intervene between the death of the decedent and the payment of the corpus would be excluded from the gross estate (see, *infra*, p. 9).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In holding that there should be included in the gross estate under Section 302 (c) of the Revenue Act of 1926, on account of the transfer in trust here involved, only the value of a remainder payable in all events upon the death of the survivor of the decedent's two nieces.

(2) In not holding that the entire sum of $157,452.82 was properly includible as held by the Tax Court.

(3) In reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

The question involved in this case is the same as that fully considered in the memorandum and brief for the respondent in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, No. 263, this Term. It is there pointed out that the decision of this Court in *Helvering* v. *Hallock*, 309 U. S. 106, requires that the full value of the trust property be included in decedent's gross estate. While the Government conceded that the value of outstanding life estates should be excluded in the cases decided by the *Hallock* opinion, and this Court so held, there is no warrant for such exclusion here for the grantor retained a life estate, and all other estates created by the trust took "effect in possession or enjoyment" only "at or after" his death.

ARGUMENT

THE FULL VALUE OF THE TRUST PROPERTY AT DECEDENT'S DEATH SHOULD BE INCLUDED IN HIS GROSS ESTATE

The question presented in this case is also involved in *Fidelity-Philadelphia Trust Company* v. *Rothensies*, 142 F. 2d 838 (C. C. A. 3d), No. 263, this Term, which is to be argued immediately before this one. Since our views are fully set forth in our memorandum in response to the petition for a writ of certiorari and our brief on the merits in that case, we believe that it is sufficient, in this brief, to indicate that under the trust established by the decedent in this case his death cut off the possibility that the corpus of the trust would revert to him and that the beneficiaries named in the trust would, in fact, never come into enjoyment of the property.

The duration of this trust was limited to the lives of decedent's two nieces. If both died before the decedent, the corpus would have been paid to the decedent (pars. A and H, *supra*, pp. 3, 4). Not until his death, his nieces surviving, could it be known that any of the gifts in trust would be effective. Hence the court below recognized the applicability of the *Hallock* case and held the transfer in trust taxable under Section 302 (c) of the Revenue Act of 1926. Indeed, the circuit court of appeals rejected the taxpayer's contention that only the value of de-

cedent's "chance"[1] of regaining the corpus $891.18—*supra*, p. 5) should be included in the gross estate.

But the court below fell into error when it rejected the Tax Court's conclusion that the entire value of the property at decedent's death ($157,452.82—*supra*, p. 5) should be included in the gross estate and held that this sum should be discounted for the period of the life expectancy of decedent's two nieces—the period which measures the duration of the trust and at the end of which the corpus would at all events be payable. Viewing the situation as it in fact existed after the decedent's death, the decedent having died without issue, there is of course no warrant for such a reduction since the corpus was immediately payable to decedent's sister and the issue of his brother and there were no intervening estates.[2]

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[1] Cf. *Central Hanover Bank & Trust Company* v. *United States*, decided November 6, 1944 (C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,153).

[2] In the courts below, the Commissioner contended, in the alternative, that the trust instrument made no provision with regard to the amount in excess of the decedent's widow's share if the decedent had no issue. It was urged that upon the failure of issue, there was a resulting trust in favor of decedent's estate when he died (Restatement, Trusts (1935), Sec. 411, Comments (g) and (k)) so that the entire amount here in controversy should be included in the gross estate under Sec. 302 (c) or (a) without regard to the legal considerations which have given rise to the conflict asserted in the petition for a writ of certiorari. The court below did

The reduction ordered by the court below is understandable, if at all, when the situation is assessed as of the time just prior to the decedent's death. At that time it was conceivable that the decedent might have issue. If he did, the issue would take interests in the income and so put off the payment of the corpus until the death of the surviving niece at the latest. We have no quarrel with this approach. We do, however, urge that the possibility of an intervening income estate does not warrant a reduction in the amount to be included in the gross estate. The income estates would take effect in "possession and enjoyment" only after decedent died; they could not be outstanding estates within the meaning of the Treasury Regulation (Appendix, *infra*, p. 14). Hence the entire value at decedent's death should have been included.

We need add to our discussion in the *Fidelity-Philadelphia* case only by referring to *Central National Bank* v. *United States*, 41 F. Supp. 239 (C. Cls.), from which the taxpayer seeks to draw support for its position (Br. in response to petition, p. 8). In that case, the Court held that the value of the trust corpora there involved should

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not discuss that contention, however, and apparently accepted the taxpayer's view that this amount passed, under the trust instrument, to decedent's sister and the issue of his deceased brother. Throughout our argument, we have accepted that construction. Cf. *Helvering* v. *Stuart*, 317 U. S. 154, 163.

be reduced by the value of the income rights of the beneficiaries which were outstanding and unaffected by the decedent's death. That conclusion is in conformity with the Government's concession in *Helvering* v. *Hallock*, 309 U. S. 106, and is distinguishable from the instant situation where there was no outstanding estate, the decedent having reserved the income for life. It should also be noted that under circumstances almost identical with those here presented, the New York courts, construing subdivision 3 of Section 249–r of the New York Tax Law and undertaking to follow *Helvering* v. *Hallock*, *supra*, and *Klein* v. *United States*, 283 U. S. 231, held that the transfer was intended to take effect in possession or enjoyment at or after death and that the full value of the trust property should be included in the gross estate. *Matter of Pratt*, 262 App. Div. 240, affirmed, 289 N. Y. 621. The trust in that case, the duration of which was measured by the lives of decedent's son and niece, provided that the settlor should have the income for life and the principal if he survived his son and niece. The decedent did not survive his niece, and in that eventuality the trust provided that his issue or his brothers and sisters should have the income until the death of the niece, at which time the principal was to be payable. The New York Court of Appeals affirmed the Appellate Division in holding that the estate tax should be assessed

on the full value of the property in the trust fund at the date of the decedent's death.[3]

CONCLUSION

The ultimate disposition of the trust property in question was effectively suspended during the decedent's lifetime. There were no outstanding estates at the time of his death. The full value of the property should be included in the decedent's gross estate, and the judgment of the court below should, therefore, be reversed and the decision of the Tax Court reinstated.

Respectfully submitted.

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DECEMBER, 1944.

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[3] The Appellate Division said (262 App. Div. at 245):

"If we are to follow the Supreme Court decisions we must hold that the effect of the decedent's death was not merely to remove an impediment in the form of the grantor's reversionary interest, but to bring about affirmatively the transfer of title to the whole fund. The remainder, which then vested for the first time, is the fund to be taxed. (*Sargent* v. *White*, 50 F. [2d] 410.) We conclude that the tax is to be assessed against the full value of the trust fund at the date of the decedent's death."

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302 [as amended by Section 404 of the Revenue Act of 1934, c. 277, 48 Stat. 680]. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(c) [as amended by the Act of March 3, 1931, c. 454, 46 Stat. 1516, and by Section 803 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169]. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a ma-

terial part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.[1]

Treasury Regulations 80 (1937 ed.):

ART. 17 [as amended by T. D. 5008, 1940–2 Cum. Bull., 286, 287]. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. Since in such transfers the decedent's

[1] The italicized portion represents the amendment made by the Act of March 3, 1931, as amended by Section 803 of the Revenue Act of 1932. These amendments are not applicable to this case since the trust was created in 1922. *Hassett* v. *Welch*, 303 U. S. 303.

death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, whether it arose by implication of law or by the express terms of the instrument of transfer, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of article 11, adjustments in the value of such transferred estates may be required. (See article 15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its

decisions in the cases of *Helvering* v. *St. Louis Union Trust Co.* (296 U. S. 39 [Ct. D. 1047, C. B. XIV-2, 339 (1935)]) and *Becker* v. *St. Louis Union Trust Co.* (296 U. S. 48 [Ct. D. 1046, C. B. XIV-2, 337 (1935)]) and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering* v. *Hallock* and companion cases (309 U. S., 106 [Ct. D. 1440, C. B. 1940-1, 223]), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein* v. *United States* (283 U. S., 231 [Ct. D. 333, C. B. X-1, 462 (1931)]), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this article, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

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